DECEMBER 7. 1765.

REPLIES

FOR

MARY DICKSON, Relict of *George Muirhead* of *Whitecastle*, now Wife of Mr. *John Noble*, Minister at *Libberton*, and him, for his Interest;

TO THE

ANSWERS for *Janet Miller*, and others.

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THE respondents surely cannot expect, that the petitioner's deceast husband, his dying in opulent circumstances, can have any influence with your Lordships, when judging of such a question as is submitted to the consideration of the court, in the petition; and yet, from some vain hope of that kind, they are at pains to magnify his estate beyond its just value: For certainly they do know, that the estate, after payment of the interest of debts, did not yield more than was sufficient to pay the petitioner's jointure of 100 *l. Sterling*, and that the lands of *Baitlaws* were sold for 14000 merks, and not for 18000, as the respondents say.

It is equally immaterial, whether the settlement made by the petitioner's husband in her favour, did proceed from her

her aſcendency over him, or whether that aſcendency was owing to the inequality of their ages, or to his facility, or any other cauſe, unleſs the reſpondents were to take up theſe as grounds for challenging the ſettlement, which they will not venture upon; at the ſame time, they have taken every opportunity in this action to give a moſt unfavourable impreſſion of the petitioner's conduct, and of her huſband's motives in making the ſettlement, which the petitioner, in her own juſtification, will be forgiven to correct them in.

The petitioner's husband is known to have been a man of ſteady diſpoſitions and conduct, and the reverſe of what is called a facile or weak man. The petitioner was twenty three years younger than him; but ſhe never underſtood that could give her ſuch aſcendency over him, as to induce him to do wrong; and if ſhe is miſtaken, many husbands are certainly in great danger; but ſhe has the happineſs of being conſcious, that her husband's bounty to her did proceed from a purer motive. They had lived long together in the greateſt harmony and friendſhip: He had kept little or no intercourſe with the reſpondents, and had no near relations, other than two ſiſters who were paſt child-bearing, and had more of their own than they could well uſe, and who had likeways ſo little regard for theſe reſpondents, that they gave their whole eſtate to a ſtranger. If a huſband, in any caſe, can ſhow a mark of favour to his wife without reflection, or a wife accept of what a husband is pleaſed to beſtow, the petitioner muſt believe, that her husband was blameleſs in giving, and ſhe in accepting of the fee of an eſtate, the yearly produce of which was no more than ſufficient to diſcharge the liferent ſhe had a title to, by her marriage contract.

It is alſo immaterial, whether the petitioner deceived her husband's ſiſters or not, by putting them off from time to time, when demanding inſpection of the ſettlement their

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brother had made, as is ſet furth in the anſwers, becauſe the reſpondents have not grounded this action upon any thing of that kind; but as this has been done with an avowed intention of creating disfavour to the petitioner's plea and defence in this action, ſhe muſt be allowed to aſſure your Lordſhips, that the ſtory told in the anſwers is altogether falſe; for that ſo far was ſhe from concealing the ſettlement made in her favours, or any other writings, from the knowledge of her ſiſters-in-law, that a gentleman in the neighbourhood, intelligent in buſineſs, and to whom they afterwards gave their eſtates, did on their behalf get inſpection of the writings immediately after their brother's death, and the ſettlement made in favour of the petitioner was then put on record, as the extracts in proceſs do prove.

The reſpondents admit, that a part of the lands in queſtion, immediately adjacent to the houſe of *Parſonlands*, was in Mr. *Muirhead*'s natural poſſeſſion at the time of his death, but aver, that the moſt conſiderable part of them which ly at a diſtance, were in the poſſeſſion of the tenants; and they ſeem to deny, that the petitioner either continued her husband's natural poſſeſſion of that part of the lands contiguous to the houſe, or that ſhe had the civil poſſeſſion of the lands and tenantry prior to the commencement of the preſent action.

The petitioner, on the other hand, after getting the beſt information ſhe can, does affirm, that the *Parſonlands* are underſtood and believed to conſiſt of ſome few acres of the Mains which was in her husband's poſſeſſion; but that the meiths and marches of them are not now known; and that there are no lands at a diſtance from the houſe, which paſs by the name, or are known to be parts of the *Parſonlands*; and ſhe further affirms, that ſhe did not only continue the poſſeſſion of the lands her huſband had the natural poſſeſſion of at the time of his death, by labouring

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and ſowing the grounds, and exerciſing all acts of property before the executing the ſummons in this action, but that ſhe, prior to that period, did continue and aſſume her huſband's civil poſſeſſion of all the other parts of the eſtate, and of theſe parts of the *Parſonlands* at a diſtance from the houſe, if any ſuch there are, by uplifting the rents, and acting in every reſpect as owner of the eſtate.

If your Lordſhips ſhall conſider the aſcertaining of theſe facts to be neceſſary before determining the cauſe, the parties muſt go to proof upon them.

The reſpondent controverts the precept of *clare conſtat* and ſaſine being a ſufficient title for preſcription to ſingular ſucceſſors: But as your Lordſhips ſeemed to have no difficulty upon this point, it is ſcarcely neceſſary to obſerve, that nothing more could be intended by the ſtatute 1617, in the caſe of ſingular ſucceſſors, than that a ſaſine with its warrant ſhould be produced prior to the forty years poſſeſſion; and that to give a judaical interpretation to the words of the ſtatute, by limiting the preſcriptive title of ſingular ſucceſſors to a charter and ſaſine, would be making a convulſion in the land rights of *Scotland*, and loſing the benefit of that valuable ſtatute.

The reſpondent, ſenſible of this, admits, that a ſaſine proceeding upon a diſpoſition containing a precept for infefting is ſufficient; but that is ſtill narrowing the ſtatute too much, which had nothing more in view than to eſtabliſh, that a ſaſine with its warrant, or one or more ſaſines without warrants, in the caſe of heirs, ſhould be a ſufficient title for the poſitive preſcription.

All our lawyers have conſturcted the ſtatute in this manner: Thus Sir *George Mackenzie*, in his obſervations upon it, § 4. ſays, " Tho' the act requires charters and ſaſines, " yet a diſpoſition or precept of ſaſine would be ſufficient, " for many compleat rights have no charter." And *Stair*, title, *Preſcription*, § 20. and *Bankton*, *vol.* 2. page 160, § 2.

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lay down the law in the ſame manner: And indeed, in a caſe collected by *Fountainhall*, 10th *June* 1697, *Heriot*'s hoſpital contra *Hepburn*, the court found, that a procuratory of reſignation, with a ſaſine relative to it, was a ſufficient title for the poſitive preſcription, tho' the precept was wanting.

If your Lordſhips ſhall then be ſatisfied, that a precept of *clare conſtat*, or a precept proceeding upon a retour, are equiparate to a charter, for conſtituting a title of the poſitive preſcription, in the ſound conſtruction of the ſtatute 1617; then, there can be no doubt of the petitioner's being entitled to connect her poſſeſſion, held under the diſpoſition from her huſband, while it remained a perſonal right, with her huſband's poſſeſſion for compleating the years of preſcription.

It is admitted in the petition, that when two titles centre in the ſame perſon, the one more beneficial than the other; as for inſtance, a title of a fee ſimple, and a tailzied fee, the poſſeſſion may be aſcribed to the moſt beneficial title, and thereby the limited right deſtroyed; but that, when two titles equally beneficial and legal, veſt in one perſon, preſcription will not operate for the one in prejudice of the other, as no perſon can preſcribe againſt himſelf; and that when the one title is proper and the other improper, the law muſt preſume the poſſeſſion to be held under the proper title; and the concluſion drawn from the premiſſes is, that as the infeftment taken by the petitioner's huſband, upon the erroneous precept of *clare conſtat*, was an improper title, his poſſeſſion cannot be imputed to that title, but to his title of apparency; and therefore, as there has been no poſſeſſion upon the erroneous title, there can be no preſcription.

When a perſon has a double title equally good and beneficial, the law cannot allow the one to have the benefit of preſcription againſt the other, or, in other words, a perſon to preſcribe againſt himſelf; and ſo it was adjudged in the

the caſe *Smith* againſt *Gray*, ſtated in the anſwers to the petition.

But the caſe here is exceedingly different; The reſpondent's huſband was apparent heir to his grandfather, and eſtabliſhed a feudal title to the lands, by an infeftment proceeding upon a precept of *clare conſtat*, from the perſon he underſtood to be his lawful ſuperior. His apparency gave him a right to poſſeſs; but the reſpondent denies, that an apparent heir can be underſtood to have a right or title to lands, and ſtill more does ſhe deny, that the right of apparency is equally beneficial to a perſonal right conſtituted by diſpoſition or feudal title, eſtabliſhed by infeftment.

An apparent heir's right, is no more than a permiſſion in the law for his poſſeſſing, originally introduced for the purpoſe only of preſerving the rents from periſhing, and which was, ſtep by ſtep, inlarged, until the rents came to be conſidered as his property while he continued in poſſeſſion; but ſtill he has no right to the land which can be tranſmitted: And therefore, the reſpondent's doctrine of titles equally good and beneficial, do not apply to this caſe. By the one title, if it may be called ſo, he was only impowered to poſſeſs, while he lived; but by the other, he became proprietor, and enabled to convey the lands to whom he thought proper.

And ſo far as the intention, or will of the petitioner's huſband can have effect, it is manifeſt, from his taking a precept from the perſon he underſtood to be his ſuperior, and infefting himſelf upon it, that he did not mean to reſt upon his right of apparency, which no length of time could convert into a right of property, but intended to become proprietor by his infeftment, which, tho' labouring under a latent inſufficiency, unknown to him, was nevertheleſs a very proper title for acquiring the property by preſcription, the property not being veſted in him by any antecedent act or deed; and here lies the material difference

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between this caſe, and that of *Smith* and *Gray*, ſo much founded on by the reſpondents: For, in that caſe, the heir, under whoſe infeftment, as ſuch, preſcription was pleaded, had got from the predeceſſor a direct conveyance to the eſtate contended for, and ſo there could be no *adjectio dominii* by the poſſeſſion under the title of heir, as the right was previouſly veſted in him.

The reſpondents have quoted three deciſions that do not aid their argument in any reſpect: In the firſt, 26th *January* 1726, Marquis of *Clydſdale* againſt the Earl of *Dundonald*, preſcription was ſaved by the poſſeſſion of a liferenter.—The ſecond, 26th *November* 1728, *Fraſer* againſt *Mackenzie*, is not applicable to this caſe:—And the third, 22d *November* 1687, *Somervel* againſt *Ingliſton*, reſpects the negative preſcription only.

The reſpondents, in ſupport of their plea of *non valentia agere*, have appealed to the deciſion in the caſe of the Duke of *Lauderdale*, where it was adjudged, that the time of a perſon's forfeiture, after being reſtored, was to be deduced in the poſitive preſcription; but the petitioner cannot admit of the juſtice of that deciſion: However, as the caſe and the principle upon which it proceeds, was fully canvaſſed in the queſtion between *Campbell* and *Campbell* of *Otter*, debated before your Lordſhips two days ago, it is not neceſſary to reſume the argument here.

In reſpect whereof, &c.

JA. MONTGOMERY.